86-241

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1986

—o—

Ann P. Fields and Gerald Fields, Individually;
and Life For God's Stray Animals, Inc.,

Petitioners,

v.

Rockdale County, Georgia; *et al.*,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

KATHLEEN KESSLER
CARR & KESSLER
3384 Peachtree Road, N.E.
Suite 250
Atlanta, Georgia 30326
(404) 233-5008

ABRAHAM A. SHARONY
4721 Chamblee-Dunwoody Road
Suite 302
Atlanta, Georgia 30338
(404) 395-6576

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTION PRESENTED

Whether the abstention doctrine should be so far extended as to require state constitutional due process and equal protection issues to be litigated in state forums before seeking relief in federal District Courts under similar federal due process and equal protection provisions.

PARTIES

The parties to this petition are Ann P. Fields, Gerald Fields, operators of the animal shelter Life For God's Stray Animals, Inc.; and Life For God's Stray Animals, Inc., a charitable, non-profit animal shelter located in Rockdale County, Georgia. Petitioners.

The Respondents are Rockdale County, Georgia; C.S. Smith, Individually and as Chairman, Rockdale County Board of Commissioners; and Randy Mills, Individually and as Director, Rockdale County Planning and Development Department.

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No. .....

—o—

In The

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Ann P. Fields and Gerald Fields, Individually; and Life For God's Stray Animals, Inc.,

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—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

—o—

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on April 8, 1986, issued as mandate on June 4, 1986, and rehearing denied May 19, 1986.

—o—

OPINIONS BELOW

Appendix, Part I is the opinion of the Eleventh Circuit Court of Appeals vacating and remanding the opinion of the District Court with directions to abstain to allow Petitioners to bring an action in state court under the Georgia constitution's equal protection and due process clauses.

Appendix, Part II is the opinion of the District Court granting a preliminary injunction and noting a reasonable likelihood that Petitioners would prevail on the issue of the unconstitutionality of the Rockdale County kennel ordinance, which was written to apply to and exclude from the county Petitioner's shelter and no other kennel in Rockdale County.

Appendix, Part III is the judgment of the Court of Appeals dated April 8, 1986 and issued as mandate on June 4, 1986.

Appendix, Part IV is the Eleventh Circuit's order dated May 19, 1986, denying Petitioners a rehearing of the abstention issue.

Appendix, Part V is excerpts from the transcript on the hearing for the preliminary injunction before the District Court.

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JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered April 8, 1986, and mandate issued June 4, 1986. App. III. Petitioners-Appellants' motion for rehearing was denied on May 19, 1986.

App. IV. This petition was filed within 90 days of the order of the Court of Appeals denying rehearing. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION, ROCKDALE COUNTY ORDINANCE AND GEORGIA CONSTITUTIONAL PROVISION INVOLVED

42 U.S.C. § 1983, pertinent part:

"Every person who, under color of any . . . ordinance . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

Rockdale County Ordinance, § 9-3009. Maximum size of kennels.

SECTION I

"(a) A kennel is hereby defined to include the keeping of dogs and/or cats for commercial, non-commercial or charitable purposes at or on a particular location or site where said dogs or cats are restrained or confined within a fence, building, structure or other enclosure.

"(b) It shall be unlawful for any person, firm, corporation, unincorporated association, partnership, joint venture, charitable organization or other legal entity to maintain or operate a kennel within Rockdale County in which the number of dogs exceeds 150 in number, or in which the number of cats exceeds 50 in number.

"(c) In determining the population limits of a kennel, joint ownership or joint control of separate kennel sites or locations by the same person, firm,

corporation, unincorporated association, partnership, joint venture, charitable organization or other legal entity shall cause all dogs and/or cats involved in such jointly owned or jointly controlled separate kennel sites or locations to be added together and counted as one kennel — if the kennel sites or locations are located within one nautical mile of each other.

"(d) This ordinance is intended to prohibit the concentration of dogs and cats so that kennel operations shall not disturb the peace, tranquility, and serenity of the various neighborhoods in this County and further is intended to protect the public health, safety and welfare relative to various diseases originating with large concentrations of animals. This ordinance shall be liberally construed to accomplish the foregoing intent and purposes.

SECTION 2

"This Ordinance is not intended to repeal or to modify the zoning laws or regulatory ordinances of Rockdale County relative to kennels and dogs or cats but as supplementary thereto.

SECTION 3

"This Ordinance shall be in force and take effect upon adoption.

"Adopted this 14th September, 1984."

Constitution, State of Georgia:

Article I, Section I, Paragraph I:

"No person shall be deprived of life, liberty, or property, except by due process of law."

Article I, Section II, Paragraph III:

"Protection to person and property is the paramount duty of government, and shall be impartial and complete."

———o———

STATEMENT OF THE CASE

This controversy arises over a Rockdale County ordinance to limit the number of animals per kennel to 150 dogs and 50 cats, regardless of the size of the tract of land containing the animals. Petitioners' animal shelter, Life for God's Stray Animals, Inc., contains approximately 1200 animals which they planned to move to a new shelter of 220 acres.

The ordinance was created, drafted and passed within 10 days of a public announcement that Life for God's Stray Animals, Inc. intended to purchase 220 acres next to the city/county dump on Miller Bottom Road in Rockdale County as a new site for their animals. App. 3, 28. The shelter had been declared a nuisance in state court at their old site (7.5 acres on Farmer Road), and ordered to cease operations. The purchase of 220 acres on Miller Bottom Road was the part of Petitioners' "urgent efforts to establish their kennel in a new location," in order to comply with the court's order to move.[1] App. 20.

Petitioners filed a complaint in the District Court for the Northern District of Georgia to have the kennel ordinance declared unconstitutional based on federal question jurisdiction and the Civil Rights statutes (28 U.S.C. §§ 1331,1343). They alleged that the ordinance was a denial of equal protection of the laws because only their animal shelter was singled out for exclusion from the county with no "rational basis." They also alleged denial

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[1] *Life For God's Stray Animals, Inc. v. New North Rockdale County Homeowners Assoc.* (two cases), — Ga. — (Case #42473, Feb. 26, 1986) and 253 Ga. 551, 322 S.E.2d 239 (1984).

of procedural due process of law as the ordinance presumed that any animals in excess of the arbitrary limitations contained in the ordinance would amount to a nuisance per se, without allowance for any evidentiary hearing. App. 18-20.

The Chairman of the Rockdale County Commission testified that the new 150/50 kennel ordinance applied only to the new Miller Bottom Road site; no other existing kennels came under this ordinance because all other existing kennels could be "grandfathered in"; as a result of a survey conducted, no other kennel in Rockdale County was subject to 150/50 animal limitations; that all existing kennels even had room to grow. App. 29, 30, 32.

"The intent to single out plaintiffs is evident both from the testimony and from the argument of the county's counsel; as counsel said, 'this ordinance addresses itself to the Fields.' " App. 19.

Because of the ordinance's presumptions and predetermination of nuisance per se if a kennel exceeds the 150/50 animal limitation. Rockdale County officials refused the Fields all necessary development permits to allow the Fields to move the animals to the new site at Miller Bottom Road. App. 31-32. Thus, as late as the hearings in this case in February and March of 1985, the Fields were unable to get permits to construct a new shelter, move the animals, or abate the nuisance declared by the Rockdale Superior Court against the Farmer Road site. App. 31.

The nuisance and setback judgments of the Rockdale County Superior Court were both decided prior to the

purchase of the Miller Bottom Road site and prior to the passage of the restrictive kennel ordinance.[2] App. 17, 19.

None of the state court litigation applies to the new kennel ordinance. None of the state court litigation applies to the Fields' use of the Miller Bottom Road property. The state court has not been inhibited by the federal court action in enforcing its judgments.[3]

The shelter and the Fields sought and received temporary relief in the United States District Court. The trial judge granted a preliminary injunction against the enforcement of the kennel ordinance *only* (App. 17), noting that there was a reasonable likelihood that the Fields would ultimately prevail in their federal constitutional challenge (on due process and equal protection grounds).

The District Court also discussed the anti-injunction statute (28 U.S.C. § 2283) as it applied to the Georgia court litigation involving the nuisance and setback issues at the Farmer Road site. App. 15-16. The District Court very carefully distinguished the jurisdiction of the state court action (Farmer Road nuisance and setback issues) with the federal court action (constitutionality of the kennel ordinance applicable only to the Miller Bottom Road property). Applying the anti-injunction statute, the District Court very carefully refused to enter into the areas of state court litigation. App. 16-17.

Having limited itself to the issue of the constitutionality of the kennel ordinance and the Fields' prayer

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[2]See *Life For God's Stray Animals, Inc. v. New North Rockdale Co. Homeowners Assoc.*, 253 Ga. 551, 322 S.E.2d 239 (1984).

[3]See cases cited at n.1.

for injunctive relief thereon, the District Court found "a reasonable likelihood that the Fields would ultimately prevail" on their federal constitutional questions against the kennel ordinance, and that a preliminary injunction was warranted. App. 20.

The Eleventh Circuit, however, vacated and remanded with instructions to the District Court to abstain from deciding the constitutionality of the kennel ordinance, and "to afford the Fields a reasonable opportunity to bring their claims in state court." App. 12.

The panel denied Petitioners' request for a rehearing. App. 26.

REASONS FOR GRANTING THE WRIT

CIRCUIT COURT'S DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT.

The Supreme Court expressly disallowed absention where the only "state law" issue is the application of state constitutional due process and equal protection provisions similar to the federal constitution.

The Eleventh Circuit's decision requires plaintiffs seeking redress from unconstitutional ordinances to first exhaust all possible state *constitutional* issues. Under the Eleventh Circuit's requirements, litigants must first exhaust even due process and equal protection issues under a state constitutional provision *similar to* the federal constitution before seeking constitutional relief in the federal forums.

Never before has the abstention doctrine been extended this far. Supreme Court decisions have admonished against such an extension:

"In *Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507 (1971), we declined to order abstention where the federal due process was not complicated by an unresolved state-law question, even though the plaintiffs might have sought relief under a similar provision of the state constitution." *Harris County Commrs. Court v. Moore,* 420 U.S. 77, 88, n.14, 95 S.Ct. 870, 877, n.14 (1975).

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AUTHORITIES MISAPPLIED

The case cited by the Eleventh Circuit as authority for abstaining can be distinguished from the Fields' situation. In *Gibson v. Jackson,* 578 F.2d 1045 (5th Cir. 1978), *cert. denied,* 439 U.S. 1119, 99 S.Ct. 1028 (1979), the plaintiff-prisoner "filed a state habeas corpus action alleging that his federal constitutional rights had been violated in his earlier criminal trial," and that the state court was required to appoint an attorney for him, in addition to allotting expenses for trial preparation. *Id.* p. 1046. He then filed a lawsuit under 42 U.S.C. § 1983 in federal court to decide the same issue of whether the state was required to appoint an attorney and provide trial funds.

The federal court abstained because the issue may be moot:

"The state trial court or state supreme court may deny petitioner's requests for assistance but nonetheless find his substantive claims meritorius, hence mooting the procedural isues [before the federal court]. Moreover, the issue here raised may be moot in the literal sense: the petitioner is presently represented by counsel in state court and that able lawyer, who appeared on petitioner's behalf before us, may

continue in the task has assumed pro-bono. The likelihood that the issues now presented will remain for decision when the state proceeding is concluded is so uncertain at this moment that an immediate decision borders on being advisory in nature." *Id.*, p. 1050.

The *Gibson* case differs markedly from the Fields' lawsuit because:

Gibson included in his earlier-filed state court case the same issue he brought to the federal court. No state litigation in the Fields' case addresses the unconstitutionality of the kennel ordinance.[4] App. 17.

No pending state court action can moot the constitutional issue presented in the Fields' case. The state court action involved nuisance and setback issues at the Farmer Road property. The state issues were already on appeal before the new kennel ordinance was passed. Further, the pendency of the federal claim has in no way hindered the enforcement of the state court orders. *Life for God's Stray Animals, Inc. v. New North Rockdale County Homeowners Association* (two cases), — Ga. — (Case #42473, Feb. 26, 1986) and 253 Ga. 551, 322 S.E.2d 239 (1984). The state court action involves separate property, separate ordinances, separate legal issues.

In *Gibson*, the prisoner's constitutional claim—right to effective assistance of counsel—was directly related to his trial on the state criminal accusations. Indeed, the accused's constitutional issues arose out of the trial on the state criminal charges. In the Fields' case, the issue of the kennel ordinance arose out of the shelter's purchase of

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[4] "*Younger* abstention is not a bar to federal court action when state judicial proceedings have not themselves commenced [cites] . . ." *Hawaii Housing Authority v. Midkiff*, — U.S. —, 104 S.Ct. 2321, 2328 (1984).

new property which was in no way associated with the state court action (nuisance and setback issue) attached to the old Farmer Road site.

In *Gibson*, the court pointed to opportunities to avoid through mootness the constitutional issue entirely. In the Fields' case, the abstention is ordered to give the Fields a chance to litigate the *same* due process and equal protection issues in the state court under *similar* state constitutional provisions. Even the Circuit Court does not see the constitutional issues as going away—only relitigated in state court. App. 12.

The *Gibson* itself case is authority for not abstaining under these circumstances:

> "Hence if the state statute is clear on its face, and the only basis for abstention is that it might violate the state constitution, there may be insufficient basis for abstention. [Cites] . . . Here, however, there is a 'realistic promise of avoiding constitutional issues' [cite] for a number of reasons other than the state court providing relief on the basis of the state constitution." *Id.*, p. 1051, n.24.

Unlike *Gibson*, resolution of the pending state issues in the Fields' case (*i.e.*, removal of the animals from Farmer Road to comply with state court's nuisance and setback orders) will not resolve or moot the kennel ordinance challenge. The shelter cannot stay at Farmer Road[5]

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[5]"[T]he court [Rockdale County Superior Court] entered another order *permanently enjoining the appellants' operation of the animals shelter* as a nuisance." *Life For God's Stray Animals, Inc. v. New North Rockdale Co. Homeowners Assoc.*, 253 Ga. 551 (1984) [emphasis added]. The shelter has been ordered to cease operation at Farmer Road, not merely rearrange to comply with setback requirements.

and thereby avoid the application of the kennel ordinance through the county's grandfather provisions. The only other property available for the shelter to occupy is Miller Bottom Road, which is subject to the provisions of the kennel ordinance. App. 28, 29.

The Circuit Court also cites as authority *Examining Board v. Flores De Otero,* 426 U.S. 572, 96 S.Ct. 2264 (1976), which holds that abstention is not appropriate "though the plaintiffs might have sought relief under a similar provision of the state constitution." *Id.*, p. 598. The Eleventh Circuit then agrees that the Georgia constitution's due process clause "does mirror the language of the Fourteenth Amendment," then says that Georgia case law "is a strain on substantive due process that extends protections beyond what federal due process alone affords." App. 31.

The Eleventh Circuit cited the *Avant* and *Barrett* cases apparently to demonstrate "unsettled" state law or the intertwining of the ordinance and state case law offering a specialized interpretation of the law. *Avant v. Douglas Co.*, 253 Ga. 225, 319 S.E.2d 442 (1984); *Barrett v. Hamby,* 235 Ga. 262, 219 S.E.2d 399 (1975). App. 8. But these cases demonstrate that the law is clear, not unsettled, and that the authority is not a "specialized" local constitutional law provision, but the Fourteenth Amendment to the United States Constitution.

Barrett, quoted as authority in *Avant,* clearly cited as authority the Fourteenth Amendment to the United States Constitution, rather than the Georgia constitution (although either could have applied). App. 8. In addition, the cases are all consistent in their constitutional

holdings on the zoning ordinances and consistent with the District Court's findings on the Rockdale County kennel ordinance.

What these cases demonstrate is *not* grounds for abstention, but that the case law is clear and that the due process and equal protection issues are, too. See, *e.g.*, *Duncan v. Poythress,* 657 F.2d 691 (5th Cir. 1981), *cert. granted,* 455 U.S. 937, 102 S.Ct. 1426, *cert dismissed,* 459 U.S. 1012, 103 S.Ct. 368 (1982). In *Duncan,* the court declined to abstain in a state election issue wherein the State alleged the intertwining of state statutes and state constitutional provisions. The court decided that the controlling special election statute, even though never before interpreted in the state courts, was clear on its face, and that other state statutes and state constitutional provisions did not resolve the due process issue. Therefore, abstention was not necessary.

Further, the Eleventh Circuit erroneously assumed that substantive due process standards applied, when Petitioners prayed that the kennel ordinance is unconstitutional on procedural due process and equal protection principles—a presumption of nuisance per se of all kennels over 150 dogs and 50 cats (even on 220 acres of land) without opportunity to present evidence (App. 9, 31); an ordinance arbitrarily written to single out Petitioners' shelter and make sure no other kennel is subject to the ordinance by *polling the other kennels!* App. 28-30.

The kennel was written for a single purpose and stands by itself. The addition of other county ordinances (*e.g.*, setback requirements) does not diminish the nuisance per se assumption written into the ordinance, nor erase the attempt to single out Petitioners' kennel.

Abstention is not appropriate "where it has seemed unlikely that resolution of the state-law question would significantly affect the federal claim." *Chicago v. Atchison, Topeka & Santa Fe Railroad Co.*, 357 U.S. 77, 84, 78 S.Ct. 1063, 1067 (1958). The county's attempt to integrate the Rockdale County's book of ordinances fails to diminish the constituional issues.

Further, the application of the *Avant* and *Barrett* cases, which rule unconstitutional exactly the type of constitutional infringement that Petitioners' complained of, does not create "ambiguity" in the state law—it shows resolution and consistency. *Harris, Otero* and *Constantineau*[6] are all in accord on this issue: "we declined to order abstention where the federal due process claim was not complicated by an *unresolved* state-law question, even though the plaintiff might have sought relief under a similar provision of the state constitution." [Emphasis added]

In *Harris County Cmmrs. Court v. Moore*, 420 U.S. 127, 96 S.Ct. 870 (1975), the Court did abstain to allow the state to resolve issues governed by *specialized* state constitutional law provisions. What was in conflict were two Texas constitutional provisions involving the tenure and removal of justices of the peace and constables, and a new statute allowing for redistricting plans which would unseat some of these judges prior to the expiration of their terms. Also, several Texas court decisions and attorney general's

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[6]*Examining Board v. Otero*, 424 U.S. 572, 96 S.Ct. 2264 (1976); *Harris Co. Commrs. Court v. Moore*, 420 U.S. 77, 95 S.Ct. 870 (1975); *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971).

opinions seemed in conflict as to the proper construction of these statutes.

The *Harris* case can be distinguished from the Fields case because the state constitutional provisions relied upon by the Eleventh Circuit was the state constitution's due process guarantee, compared to the specialized Texas election statutes in *Harris*. The only state law construction in the Fields' case are the issues of due process and equal protection, and it is these very issues that the Eleventh Circuit requires Petitioners to first litigate in state court. App. 8-9.

For the federal courts to *require* due process and equal protection claims to be first litigated under state constitutional law provisions before the federal forum will be available to them, dilutes to meaninglessness federal question jurisdiction.

The opinions of this Court expressly halt the abstention doctrine short of requiring federal due process and equal protection issues to be first litigated in state courts:

> "Indeed, to hold that absention is required because [the challenged ordinance] might conflict with the cited broad and sweeping [state] constitutional provisions, would convert abstention from an exception into a general rule."
>
> *Examining Board v. Otero*, 426 U.S. 595, 598, 96 S.Ct. 2264, 2279 (1976).

YOUNGER ABSTENTION ERRONEOUSLY APPLIED

Younger[1] abstention does not apply in this lawsuit because no *pending* state court lawsuit is concerned with the interpretation of the kennel ordinance. Whether state action is pending is "critical to the application of Younger." C. Wright, The Law of Federal Courts 325 (1983). See *Hawaii Housing Authority v. Midkiff,* —— U.S. ——, 104 S.Ct. 2321, 2327-8 (1984); *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S.Ct. 2515, 2521-22 (1982).

Litigation in the state courts in this case now before the Court has concerned only the Farmer Road property and only the issues of nuisance and setback. The Georgia Supreme Court has ruled on these issues.[2] It would be beyond the bounds of judicial authority for the Rockdale County trial judge to mold a decree deciding constitutional issues without any evidence on an ordinance that has not even been raised or tried within the lawsuit. Therefore, there is no "concurrent state court proceedings that present a comparable threat of inconsistent outcomes and attendant friction," and no basis for Younger abstention. App. 17.

Defendant Rockdale County officials admit that the 150/50 kennel ordinance would not apply to the Farmer Road site because of the county's grandfather provisions. App. 33. Therefore, the court erroneously found a "pos-

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[1]*Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746 (1971).

[2]See n.2 *supra,* for Georgia case cites.

sibility . . . of 'parallel proceedings' in state and federal court" (App. 11), because the state and federal court issues deal with separate ordinances, separate land and separate legal principles.

The panel erroneously suggested that the Plaintiffs had an opportunity to present their federal claims in the state proceedings. App. 10. The state cases were already filed, decided by the trial judge, and on appeal before the kennel ordinance existed. See n.2, *supra*. Plaintiffs can hardly be said to have forfeited their opportunity to raise federal constitutional issues in federal court under these facts.

Not only is there no pending state court action involving the kennel ordinance, but there was no opportunity to raise the issue in state court proceedings. App. 17. On this basis, the Younger abstention authorities cited by the Eleventh Circuit can be distinguished from the facts of this lawsuit. See, *e.g.*, *Moore v. Sims*, 442 U.S. 415, 425, 99 S.Ct. 2371, 2378 (1979); *Juidice v. Vail*, 430 U.S. 327, 337, 97 S.Ct. 1211 (1977).

Finally, in the state court litigation the *homeowners* sued in a private tort for nuisance and setback enforcement —hardly a "[p]roceeding necessary for the vindication of important state policies or the functioning of the state judicial system." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515 (Chief Justice Burger's statement of the test for "vitalness"). Unless "vital state interests" are at stake, federal district courts are not proscribed from interfering with ongoing state civil proceedings when necessary to vindicate

federally protected civil rights. *Miofsky v. Superior Court Of The State Of California,* 703 F.2d 332, 337-8 (9th Cir. 1983). See also, *Hawaii Housing Authority v. Midkiff,* —— U.S. ——, 104 S.Ct. 2321, 2327-8 (1984); *Traughber v. Beauchane,* 760 F.2d 673 (6th Cir. 1985) (private tort suit did not involve "vital state interests").

Younger abstention is inappropriate in this lawsuit where the state action is totally unrelated to the federal action in terms of ordinances, property and legal issues, and no pending state action involves the kennel ordinance.

PULLMAN ABSTENTION ERRONEOUSLY APPLIED

In *Railroad Comm'n. Of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the Supreme Court held that federal courts should abstain from deciding cases when difficult or unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided.

"However, federal courts need not abstain on *Pullman* grounds when a state statute is not 'fairly subject to an interpretation which will render unnecessary' the federal constitution question. See *Harman v. Forssenius,* 380 U.S. 528, 535, 85 S.Ct. 1177, 1182 (1965)." *Hawaii Housing Authority v. Midkiff,* —— U.S. ——, 104 S.Ct. 2321, 2327 (1984).

Further, the Supreme Court has "frequently emphasized that abstention is not to be ordered unless the statute is of uncertain nature, and is obviously susceptible of a limiting construction." *Zwickler v. Koota,* 389 U.S. 241, 251, n.14, 88 S.Ct. 391, 397, n.14 (1967).

The kennel ordinance is not susceptible to a limiting construction because:

(1) The ordinance has a built-in presumption of nuisance[3] that prohibits a kennel larger than the 150/50 limits from having the opportunity of proving that it can function just like any other kennel or animal farm. The animal shelter is thereby denied use and enjoyment of its land that other property owners in Rockdale County enjoy without any opportunity of an evidentiary hearing; *i.e.*, without due process of law, while the county, through development permits, has alternatives to protecting the public welfare. App. 33-34. See *Village Of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926).

(2) Testimony shows that Life For God's Stray Animals, Inc. was singled out for exclusion from the county by the ordinance—which activity was not "obviously susceptible of a limiting construction." No amount of legal analysis will change the fact that the ordinance's creation was triggered by the announcement that the shelter intended to purchase 220 acres on Miller Bottom Road, or that the chairman of the county commission ordered a poll of all kennels to make sure the ordinance would not affect them, but only affect Life For God's Stray Animals, Inc. App. 28-30, 32.

(3) When the ordinance fails in its sole stated purpose to limit concentrations, no amount of construction with other statutes will cure that defect:

> "Concentration, the suggested concern of the ordinance, is a function of two different factors: population

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[3]Even the Rockdale County attorney does not adhere to the "nuisance per se" theory built into the ordinance. App. 31-32.

> and area. The ordinance regulates population alone with no reference to, or consideration of, size of the property where animals are kept; as a consequence, the ordinance creates a restriction that is entirely irrelevant on its face to the legislative goal. That irrelevance constitutes irrationality, and the ordinance therefore fails rationally to relate to the expressed legislative purpose [and] . . . it does not substantially relate to general welfare." App. 19-20.

The analysis of *Avant* and *Barrett, supra,* p. 12, shows that there are no additional "difficult" or "unsettled" questions of state law.

The ordinance is not uncertain in its limitation of animals and application, and it has no reasonable limiting construction. Therefore, *PULLMAN* abstention is unnecessary. *Hawaii Housing Authority v. Midkiff,* —— U.S. ——, 104 S.Ct. 2321, 2327 (1984).

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DISTRICT COURT'S DISCRETION NOT CHALLENGED

"Because of the complexity of factors which guide a particular decision on Pullman abstention, we have often held that a decision of the district court will be reversed on appeal only upon a showing of an abuse of discretion entrusted to a trial court [Cites]." *Duncan v. Poythress,* 657 F.2d 691, 697 (former 5th Cir. 1981), *cert. dismissed,* 459 U.S. 1012, 103 S.Ct. 368 (1982).

No part of the Eleventh Circuit's opinion cites the District Court for abuse of discretion.

Included in the testimony and the trial court's opinion were evidence of "plaintiff's urgent efforts to establish

their kennel in a new location (App. 20) to comply with nuisance findings; and the county's ability to control kennels through development permits, without the necessity of limiting animals and banning the kennels altogether. App. 31, 33-34.

In consideration of the totality of circumstances, including delay and costs of bringing another action, the ability of the county to control Petitioners' kennel with development permits, the immense pressure on the Fields to move from Farmer Road,[7] the unconstitutionality of the ordinance on its face, and the fact that no suit is pending which involves the kennel ordinance or the Miller Bottom Road property, abstention seems heavily contraindicated.

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CONCLUSION

Petitioners respectfully pray this Honorable Court to reverse the Circuit Court's decision to abstain, because this decision is contrary to the Supreme Court's doctrine as stated in *Wisconsin v. Constantineau,* 400 U.S. 433, 91 S.Ct. 507 (1971), and similar family of cases.

Where the state constitutional due process and equal protection guarantees are similar to the federal constitutional provisions, the federal forum should not be closed to petitioners.

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[7]Jail sentences ordered for inability to move, while the numerous development permits are fraught with expensive requirements. *Life For God's Stray Animals, Inc. v. New North Rockdale County Homeowners Assoc.,* — Ga. — (Case #42473, Feb. 26, 1986).

To allow the Eleventh Circuit's decision to remain law is a dangerous precedent, because the decision set a precedent which virtually closes down federal question jurisdiction where a parallel state constitutional provision can be found. It also abdicates federal supremacy to state's interpretation of the federal constitution.

Petitioners earnestly and respectfully pray for a reversal of the abstention decision.

Respectfully submitted,

ATTORNEYS FOR PETITIONERS

Kathleen Kessler

Abraham A. Sharony

Please address all
communications to:

Kathleen Kessler, Esq.
Carr & Kessler
3384 Peachtree Road, N.E.,
Suite 250
Atlanta, Georgia 30326
(404) 233 5008
St. Bar #416575

APPENDIX, PART I

Ann P. FIELDS, et al.,

Plaintiffs-Appellees,

v.

ROCKDALE COUNTY GEORGIA, et al.,

Defendants—Appellants.

No. 85-8286.

United States Court of Appeals, Eleventh Circuit.

April 8, 1986.

Landowners brought action challenging county ordinance regulating kennels. The United States District Court for the Northern District of Georgia, Marvin H. Shoob, J., granted preliminary injunction and county appealed. The Court of Appeals, Godbold, Chief Judge, held that abstention was warranted.

Vacated and remanded.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, ATKINS*, Senior District Judge.

GODBOLD, Chief Judge:

Gerald and Ann Fields, under the name "Life for God's Stray Animals, Inc." began a not-for-profit "no-kill" animal shelter some time before 1980, operated on a

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* Honorable C. Clyde Atkins, Senior District Judge for the Southern District of Florida, sitting by designation.

lot on Presidential Circle in Lakeview Estates, a mobile home park in Rockdale County, Georgia. The number of animals maintained at this site was as great as 300. The county filed suit in the Superior Court of Rockdale County to enjoin the Fields from maintaining the shelter in the trailer park. A consent order was entered in August 1980 allowing the Fields to move the shelter to a seven-acre site on Farmer Road, elsewhere in the county. This decree required the Fields to seek appropriate building permits and zoning variances and to build a fence along the Farmer Road frontage to conceal the shelter.

The shelter was moved to the Farmer Road site. The Fields applied to the County Board of Zoning Appeals for a variance from a 200-foot setback ordinance but were denied. They did not appeal the denial to the County Board of Commissioners. In 1982 the county filed suit in superior court to enjoin the Fields from expanding the Farmer Road shelter. An order was entered in July 1982 prohibiting further expansion.

Early in 1983 a neighborhood association sued the county and the Fields in superior court to abate an alleged nuisance and to require enforcement of the setback ordinance. The county cross-claimed. Following trials, orders were entered requiring the county to enforce the setback and enjoining the Fields from operating a nuisance. The order addressed to the Fields directed them to propose a compliance plan. Presumably no such plan was submitted. The orders were stayed pending the Fields' appeal. The Supreme Court of Georgia affirmed the judgments. *Life for God's Stray Animals, Inc. v. New North Rockdale County Homeowners Ass'n*, 253 Ga. 551, 322 S.E.2d 239 (1984).

In September 1984, shortly before the Georgia Supreme Court issued its decision, the Fields contracted to buy a 220-acre parcel of land, also in Rockdale County, on Miller Bottom Road, adjoining the county dump. They hoped to transfer the population of the Farmer Road site, which then totalled approximately 1,000 animals, to a new facility to be built at Miller Bottom. News of the purchase was published, and within ten days the county passed an ordinance[1] that would limit the population of animals in

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1. Section 9-3009—MAXIMUM SIZE OF KENNELS.

(a) A kennel is hereby defined to include the keeping of dogs and/or cats for commercial, non-commercial or charitable purposes at or on a particular location or site where said dogs or cats are restrained or confined within a fence, building, structure or other enclosure.

(b) It shall be unlawful for any person, firm, corporation, unincorporated association, partnership, joint venture, chariable organization or other legal entity to maintain or operate a kennel within Rockdale County in which the number of dogs exceeds 150 in number [sic], or in which the number of cats exceeds 50 in number.

(c) In determining the population limits of a kennel, joint ownership or joint control of separate kennel sites or locations by the same person, firm, corporation, unincorporated association, partnership, joint venture, charitable organization or other legal entity shall cause all dogs and/or cats involved in such jointly owned or jointly controlled separate kennel sites or locations to be added together and counted as one kennel —if the kennel sites or locations are located within one nautical mile of each other.

(d) This ordinance is intended to prohibit the concentration of dogs and cats so that kennel operations shall not disturb the peace, tranquility, and serenity of the various neighborhoods in this County and further is intended to protect the public health, safety and welfare relative to various diseases originating with large concentrations of animals. This ordinance shall be liberally construed to accomplish the foregoing intent and purposes.

(Continued on following page)

any kennel to 150 dogs and 50 cats. Commonly owned or managed kennels located within a one natical mile radius of one another were treated under the ordinance as a single kennel. The Fields consummated the purchase of the Miller Bottom property in November 1984.

Upon remand from the Georgia Supreme Court, the superior court in January 1985 found the county in non-willful contempt of its order requiring the county to enforce the setback at the Farmer Road site. The county moved for a permanent injunction against the Fields, and in February 1985 the superior court ordered the Fields to remove by February 25 all structures on the Farmer Road property not within the 200-foot setback line. The Fields appealed these orders and moved for stays. The superior court denied a stay. The Fields then filed a motion for supersedeas, which was denied, and the denial was affirmed by the Georgia Supreme Court on February 20.

On February 25, the day of expiration of the deadline for removal set by the superior court, the Fields filed this

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(Continued from previous page)

(e) Any violation of this Ordinance shall subject the offender to a fine of Five Hundred and no/100 ($500.00) Dollars and/or up to thirty (30) days in the common jails of Rockdale County for each forty-eight (48) hour period that said violation continues.

SECTION 2

This Ordinance is not intended to repeal or to modify the zoning laws or regulatory ordinances of Rockdale County relative to kennels and dogs or cats but as supplementary thereto.

SECTION 3

This Ordinance shall be in force and take effect upon adoption.

Adopted this 14th day of September, 1984.

suit against the county in the U.S. District Court, praying for damages and temporary and permanent injunctive relief. The complaint alleged fraud and conspiracy in the county's defense of the homeowners association litigation, thus depriving the Fields of due process, contractual rights, and freedom of religion. The complaint also alleged that the kennel ordinance was arbitrary and unreasonable, that it was the basis of the county's refusal to grant building permits for the Miller Bottom tract, and that it created a suspect class "directed against" the Fields. The complaint further alleged that the Fields applied on November 30, 1984 for development permits for Miller Botton and that the County had refused, in part because of the kennel ordinance, to issue the permits. Also, the Fields alleged that the kennel ordinance was selectively enforced and that the county's refusal to grant building permits for the Miller Road site was a taking without just compensation. The homeowners association was permitted to intervene, and the Fields amended their complaint to include allegations against the association.

On February 26, 1985 the district court granted the Fields a temporary restraining order, and on March 25 the court issued a preliminary injunction against the county. The court found that it had no jurisdiction over the allegations related to the litigation of the setback ordinance at Farmer Road, citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923)[2] The district court held that abstention doctrines did not bar its exercise of jurisdiction over the allegations related to the kennel ordinance. In its analysis of the propriety of

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2. The Fields have not raised the correctness of this ruling.

abstention under the doctrine of *Younger v. Harris,* 401 U.S. 37, 97 S.Ct. 746, 27 L.Ed.2d 669 (1971), the court noted that the constitutionality of the kennel ordinance had not been raised in earlier state court proceedings and that relief could be framed that would not affect pending state proceedings. As for abstention under the doctrine of *Railroad Comm'n v. Pullman,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), the court found that the Fields had "not articulated any real question of state law [and], in any event . . . there is no indication that the state law to be applied is unsettled or involves a unique state constitutional issue. . . ."

Having crossed the abstention threshold, the district court applied the familiar four-part test to determine the propriety of preliminary injunctive relief, *see Gresham v. Windrush Partners, Ltd.,* 730 F.2d 1417, 1423 (11th Cir.), *cert. denied,* — U.S. —, 105 S.Ct. 249, 83 L.Ed.2d 187 (1984) and concluded that the relevant factors, including a reasonable likelihood that the Fields would ultimately prevail in their federal equal protection challenge, warranted a preliminary injunction.

The county appealed. It issued development permits for the Miller Bottom property on May 3, 1985 but reserved its legal rights, specifically those at issue here. The intervenor association is not a party to this appeal.

DISCUSSION

Abstention is "an extraordinary and narrow exception to the duty of a [federal] Court to adjudicate a controversy properly before it," and is justified "only in the exceptional circumstances where the order to the parties

to repair to the state court would clearly serve an important countervailing interest." *Allegheny County v. Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). Abstention questions must be resolved by close attention to the facts of each case. *Baggett v. Bullitt*, 377 U.S. 360, 375-79, 84 S.Ct. 1316, 1324-26, 12 L.Ed.2d 377 (1964); *Ross v. Houston Indep. School Dist.*, 559 F.2d 937, 942 (5th Cir. 1977). In this case there are exception circumstances and countervailing interests.[3]

Matters of land use planning are primarily of local concern, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28, 79 S.Ct. 1070, 1072, 3 L.Ed.2d 1058 (1959). The "routine application of zoning regulations . . . is distinctly a feature of local government," *Hill v. City of El Paso*, 437, F.2d 352, 357 (5th Cir.1971). In *Hill*, the issue was whether plaintiff's business was a public garage or a "junk" yard and, if the latter, whether the city ordinance proscribing junkyards was impermissibly vague under the federal constitution. Plaintiff sought an injunction of state civil and criminal proceedings and a declaration that the zoning ordinance was unconstitutional. Noting that the ordinance was unclear on its face and that a state court decision could moot the federal constitutional question, *Hill* held that the facts presented a "classic" case for abstention under *Pullman*.

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3. The case presents factors that evoke concerns that have shaped both the *Railroad Comm'n v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) and *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) abstention doctrines. Their conjunction "militates in favor of staying our hand." *Gibson v. Jackson*, 578 F.2d 1045, 1051 (5th Cir.1978), *cert. denied*, 439 U.S. 1119, 99 S.Ct. 1028, 59 L.Ed.2d 79 (1979).

In the present case there is no parallel unclarity as to whether the Fields operate a "kennel", but there is considerable lack of clarity surrounding the possible application of the kennel ordinance to the Fields' operations. Even if the kennel ordinance were a model of clarity, there is a "fair possibility" that a state court would strike it as contrary to the Georgia constitution, which would avoid the necessity of reaching federal constitutional questions. *See* C. Wright, The Law of Federal Courts 304 (1983); *see also, Avant v. Douglas County,* 253 Ga. 225, 319 S.E.2d 442 (1984) (striking, on unspecified constitutional grounds, an ordinance "limiting the number of animals per tract without taking into consideration the size of the tract"), *following Barrett v. Hamby,* 235 Ga. 262, 219 S.E.2d 399 (1975) (striking zoning ordinance on Fourteenth Amendment and Georgia constitutional due process grounds).

Abstention is not necessarily appropriate if the relevant state constitutional provision "is the mirror of the federal one." Wright at 305; *see also, Examining Board v. Flores de Otero,* 426 U.S. 572, 598, 96 S.Ct. 2264, 2279, 49 L.Ed.2d 65 (1976). The relevant Georgia constitutional provision[4] does mirror the language of the Fourteenth

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4. Article I, section 1, paragraph 1 of the Georgia constitution reads: "No person shall be deprived of life, liberty, or property except by due process of law."

The Georgia Supreme Court has held that the protections of Georgia's due process clause may exceed those of the Fourteenth Amendment. *National Mtg. Corp. v. Suttles,* 194 Ga. 768, 22 S.E.2d 386, 389 (1942); *cf. BT Investment Mgrs., Inc. v. Lewis,* 559 F.2d 950, 954 & n. 15 (5th Cir.1977) (rejecting *Pullman* abstention, citing Florida Supreme Court decision that Florida constitutional provision is "coextensive" with Fourteenth Amendment due process clause).

Amendment due process clause, but the Georgia decisional law represented by *Avant* and *Barrett* is a strain of substantive due process[5] that extends protections beyond what federal due process alone affords. *Cf. Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (federal due process is not an independent source of property rights). Therefore the kennel ordinance is part of a whole that resembles in important respects the "integrated scheme of related constitutional provisions, statutes and regulations [which] as a whole" called for "clarifying interpretation by the state courts" in *Harris Cty. Comm'rs Ct. v. Moore,* 420 U.S. 77, 83, 85 n. 8, 88, 95 S.Ct. 870, 875, 876 n. 8, 877, 43 L.Ed.2d 32 (1975); *see also Hill,* 437 F.2d at 356 (noting the city's argument that its ordinance was drafted to conform to state constitutional decision law). That the kennel ordinance has never been construed by a state court is a further circumstance favoring abstention. *See Lake Carriers' Ass'n v. MacMullan,* 406 U.S. 498, 511, 92 S.Ct. 1749, 1758, 32 L.Ed.2d 257 (1972); *Abell v. Frank,* 625 F.2d 653, 656-58 (5th Cir.1980).

This court has abstained from deciding land use disputes involving zoning, *see Hill,* and the exercise of eminent domain, *see Fountain v. MARTA,* 678 F.2d 1038, 1046 (11th Cir.1982); *Creel v. City of Atlanta,* 399 F.2d

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5. This court declined to abstain from deciding a challenge based on state substantive due process decisional law in *Henley v. Herring,* 779 F.2d 1553 (11th Cir. Jan. 14, 1986). The facts of *Henley* differ in important ways from those presented here. There was no concurrent state court litigation, and the challenge was directed against the use of a state vacation procedure that had been clarified by extensive consideration in the state courts.

777, 779 (5th Cir.1968), where there were concurrent proceedings[6] in the state courts. Here, there is a land use dispute implicating concurrent state court proceedings that present a comparable threat of inconsistent outcomes and attendant friction. "[T]he federal court should not exert jurisdiction if the plaintiffs 'had an *opportunity* to present their federal claims in the state proceedings,'" but did not do so. *Moore v. Sims,* 442 U.S. 415, 425, 99 S.Ct. 2371, 2378, 60 L.Ed.2d 994 (1979), *quoting Juidice v. Vail,* 430 U.S. 327 337, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977) (emphasis in original). That the new kennel ordinance has been cited in no pleading or motion in the pending state litigation does not mean that the facts calling for abstention are any less compelling. There is no indication that the kennel ordinance cannot be challenged[7] in superior court now.

The record does not reveal what impact on the Farmer Road site compliance with the February 1985 superior

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6. *Younger* abstention may not be proper where the district court

> properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith, or where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

Huffman v. Pursue, Ltd., 420 U.S. 592, 611, 95 S.Ct. 1200, 1212, 43 L.Ed.2d 482 (1975). The district court made no such findings here.

7. *See* e.g., Ga.Code Ann. §§ 23-4-31 ("Power of court to mold and enforce decrees"), 9-11-60 ("Relief from judgments") (1982 & 1984 Supp.); *City of Cordele v. Hobby,* 240 Ga. 207, 240 S.E.2d 16 (1977) (upon verdict finding nuisance, court is to "mold its decree to meet the exigencies of the case . . .").

court order would have.[8] It is possible therefore that the state court will be called upon[9] to exercise its continuing jurisdiction to apply the kennel ordinance to a residual animal population at Farmer Road, while, in the meantime, the federal court deals with the application of the ordinance to Miller Bottom. This possibility presents more than the prospect of "parallel . . . proceedings" in state and federal court with respect to distinct parcels of real estate. *Cf. Fountain,* 678 F.2d at 1046 & n. 14. The kennel ordinance by its terms would count geographically distinct kennels within a nautical mile of one another as a single kennel. The record does not establish whether the Farmer Road and the Miller Bottom sites are to be counted as one under the ordinance. The "possibility of inconsistent judgments" and "insuperable difficulties . . . over the proper remedy" evident here are exceptional circumstances favoring abstention by the federal court. *See Fountain,* 678 F.2d at 1046; *Creel,* 399 F.2d 779.

We note the indications in the record that the county does not intend to press the kennel ordinance against the

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8. Although the superior court order of January 1984 enjoined the Fields from operating the shelter at Farmer Road, the apparently superceding February 1985 order suggests that the Fields comply by "[r]eorganiz[ing] . . . the use of existing structures [at Farmer Road] that are in compliance with the setback requirements, so that as many animals as humanely possible are housed in structures that do not violate the setback requirements." The federal court's order of February 26, 1985, granting temporary injunctive relief, found it unclear "whether the shelter can be reorganized on its present location to comply with the setback requirements."

9. The homeowners association has stated that it is interested in closing down the Farmer Road kennel altogether, an interest that it asserts the county does not share. *See* Motion of Homeowners Association to Intervene, Record at 93.

Fields until the constitutional issues raised here have been adjudicated. "[T]he District Court of course possesses ample authority in this action, or in such supplemental proceedings as may be initiated, to protect the appellees" while awaiting the judgment of the state courts. *Harrison v. NAACP,* 360 U.S. 167, 178-79, 79 S.Ct. 1025, 1031, 3 L.Ed.2d 1152 (1959); *see also, Babbitt v. Farm Workers,* 442 U.S. 289, 312 n. 18, 99 S.Ct. 2301, 2316 n. 18, 60 L.Ed.2d 895 (1979). Accordingly, we vacate the judgment and remand to the district court with instructions to afford the Fields a reasonable opportunity to bring their claims in state court, meanwhile to retain jurisdiction for further proceedings consistent with this opinion.

VACATED and REMANDED with directions.

APPENDIX, PART II

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Filed in Clerk's Office
U.S.D.C. — Atlanta

March 25, 1985

Ben H. Carter, Clerk
By: G. Jackman, Deputy Clerk

CIVIL ACTION C85-1741A

ANN P. FIELDS, et al.,
Plaintiffs,

v.

ROCKDALE COUNTY, GEORGIA, et al.,
Defendants.

ORDER

This lawsuit challenges an alleged conspiracy and fraudulent conduct by officials of Rockdale County and a group of homeowners against plaintiffs and the large animal shelter they own and operate. Plaintiffs allege that the conduct of litigation by defendants in Superior Court of Rockdale County denied them due process and that an ordinance enacted by the Rockdale County Commission on September 14, 1984, limiting the number of dogs and cats that may be owned by an individual or group at a particular location, is unconstitutional.

Plaintiffs moved for a preliminary injunction to restrain defendants from taking any steps to move the animal shelter facilities and animals from their present location, to determine that the new ordinance is unconstitu-

tional, and to direct defendants to issue development permits on plaintiffs' new property.

In order to obtain a preliminary injunction, a movant must show that (1) he is likely to prevail upon the merits at a final determination, (2) that he will suffer irreparable injury unless the injunction issues, (3) that the threatened injury to movant outweighs whatever damage the proposed injunction may cause the opposing parties, and (4) the injunction would not be adverse to the public interest. *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir.), *cert. denied*, 105 S.Ct. 249 (1984); *Penthouse International, Ltd., v. Webb*, 594 F.Supp. 1186, 1191 (N.D. Ga. 1984).

Before turning to the four criteria of preliminary injunctive relief, the Court must examine its jurisdiction over the several counts in the complaint and its power to afford plaintiffs some of the preliminary relief they seek.

In count one of the complaint, plaintiffs allege a violation of their rights to due process in the state courts of Georgia. They contend that Rockdale Superior Court improperly disregarded a 1980 consent order between Rockdale County and plaintiffs; that the Superior Court failed to afford them a fair and adequate opportunity to participate in a hearing on a petition for a writ of mandamus; that the Superior Court wrongly entered an injunction against plaintiffs after taking no evidence at the hearing on the injunction request; that the Superior Court denied plaintiffs a jury trial on a cross-claim for damages; and that the Superior Court and the Georgia Supreme Court denied writs of supersedeas pending appeal of the injunction entered against them.

In count two, plaintiffs allege that the new ordinance is unconstitutionallly arbitrary and unreasonable, that it violates their right to equal protection of the laws, and that it was unlawfully enacted.

Counts three and four do not add substantive claims; they merely specify relief sought. Plaintiffs have moved to amend the complaint, but the proposed amendments do not affect determination of the motion for a preliminary injunction.

Federal district courts have no jurisdiction to entertain a proceeding to reverse or modify the judgment of a state court for constitutional errors; to entertain such a proceeding would be an exercise of appellate jurisdiction. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Reynolds v. Georgia*, 640 F.2d 702 (5th Cir. Unit B), *cert. denied*, 454 U.S. 865 (1981); *Collins v. Collins*, 597 F.Supp. 33 (N.D. Ga. 1984).

In count one plaintiffs seek relief that is barred by *Rooker*. To avoid the *Rooker* bar, they invoke *Wood v. Orange County*, 715 F.2d 1543 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 2398 (1984).

Wood acknowledged that the Supreme Court had reaffirmed the *Rooker* doctrine in *District of Columbia Court of Appeals v. Feldman*, — U.S. —, 103 S.Ct. 1303 (1983); but in light of a lengthy footnote in the Supreme Court's opinion, *see Feldman*, 103 S.Ct. at 1315 n.16, the court of appeals interpreted the *Rooker* bar as applying only to issues that a plaintiff had a reasonable opportunity to litigate in state court. *Wood*, 715 F.2d at 1547.

Plaintiffs argue that, because they had no opportunity to present their case in Rockdale Superior Court, their

claim falls within the *Wood* exception to the *Rooker* bar. This argument fails. Even if plaintiffs' allegations about Rockdale Superior Court are correct, plaintiffs have failed to show that they have had, and continue to have, no reasonable opportunity to litigate the issues presented in count one[1] during their past and present appeals to the Georgia Supreme Court. The proper question under *Wood* is not whether plaintiffs found no fair opportunity to litigate in one particular state court, but whether they had no meaningful opportunity to be heard in the entire state court system, including its appellate courts.

Furthermore, the facts presented in *Wood* that resulted in a finding of no fair opportunity to litigate are very different from those in this case. In *Wood*, plaintiffs, who were challenging the validity of liens entered against them in state court, had signed affidavits waiving notice of any lien proceedings. They learned about judgments on the lien proceedings only after time for appeal had elapsed. As a result, they were utterly foreclosed even from appearing at the proceedings. In this case an attorney for plaintiffs was present at every hearing in Rockdale Superior Court and had the opportunity to register objections.

Because plaintiffs were not denied a fair opportunity to litigate their due process claims in the state courts of Georgia, the Court concludes as a preliminary matter that it is without jurisdiction over count one of the complaint. The Court therefore will not consider fashioning any in-

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[1] Plaintiffs' claims that the lack of a record in Superior Court precludes effective appellate review may be raised before and considered by the Georgia Supreme Court.

junctive relief that would have as a direct or indirect effect the review or modification of judgments by Rockdale Superior Court or the Georgia Supreme Court.

Count two of the complaint, which alleges unconstitutionality of the new county ordinance, is properly before the Court. If the constitutionality of the ordinance had been made an issue in the earlier proceedings in state courts, this Court might have to abstain under the principles enunciated in *Younger v. Harris,* 401 U.S. 37 (1971). Because, however, that issue was never raised in the state courts, and because this Court may frame relief that would not affect the pending state enforcement proceedings, *Younger* does not apply.

The doctrine of postponement of federal constitutional adjudication in *Railroad Commisison of Texas v. Pullman Co.,* 312 U.S. 496 (1941), does not apply here because, although plaintiffs have vaguely alluded to violations of state law or county ordinances, they have not articulated any real question of state law. In any event, even if plaintiffs were to articulate such a question, there is no indication that the state law to be applied is unsettled or involves a unique state constitutional issue, both of which would make *Pullman* abstention appropriate. *See* C. Wright *The Law of Federal Courts* 304 (4th ed. 1983).

Nor is abstention of the sort involved in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), required here. No particularly complicated system of regulation is present here to cause the Court to defer to the state, and it is established that federal courts may properly review state land-use regulation. *See Nasser v. City of Homewood,* 671 F.2d 432, 439-440 (11th Cir. 1982); *South Gwinnett*

Venture v. Pruitt, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied,* 419 U.S. 837 (1974). The Court will therefore proceed to consider, on a preliminary basis, the constitutionality of the new ordinance.[2]

Because plaintiffs have not shown that the ordinance creates any suspect classification or impinges upon any fundamental right,[3] the appropriate standard of review is the "rational basis" test. That test requires merely that laws be "seen to have a reasonable relation to a proper legislative purpose, and [be] neither arbitrary nor discriminatory." *Nebbia v. New York,* 291 U.S. 502, 537 (1934).

As the former Fifth Circuit, sitting en banc, stated regarding a challenge to a zoning decision,

> The only question which federal district court may consider is whether the action of the zoning commission is arbitrary and capricious, having no substantial relation to the general welfare. It necessarily follows that upon a factual showing of arbitrariness there must be some basis in fact and law to justify the zoning action as consistent with reasonableness.

South Gwinnett Venture, 491 F.2d at 7.

Evidence at the hearing on the motion for a preliminary injunction made it quite clear that the classification contained in the ordinance—the numerical limit on maintenance of dogs and cats—was arbitrary, capricious, and ir-

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2 The ordinance is reprinted as an appendix to this order.

3 Plaintiffs have stated that there is a suspect classification and that the ordinance limits the free exercise of their religion, but they adduced no evidence in support of those statements.

rational. There was no evidence of any principled attempt to study the effects of any particular concentration or population of animals. Instead, to arrive at the limit imposed by the ordinance, employees of the county commission called all the county's major kennels *except that of plaintiffs* and ascertained what restrictions the other kennels would find convenient for their own purposes. The intent to single out plaintiffs is evident both from the testimony and from the argument of the county's counsel; as counsel said, "This ordinance addresses itself to the Fields." There is hardly a more arbitrary or discriminatory way that the ordinance could have been fashioned.

In light of the strong factual showing of arbitrariness, the Court must consider whether the zoning action is consistent with reasonableness and substantially relates to the general welfare. The sole legislative purpose expressed in the ordinance and in argument by counsel for Rockdale County is abatement of the noise and health hazards that result from large *concentrations* of animals. The Court finds that purpose to be a legitimate county objective. On the other hand, the ordinance does not regulate *concentrations* at all. It merely limits the numbers of dogs and cats that may be kept at one site, or at any jointly owned or controlled groups of sites within one nautical mile, regardless of the sizes of the sites. Concentration, the suggested concern of the ordinance, is a function of two different factors: population and area. The ordinance regulates population alone with no reference to, or consideration of, size of the property where animals are kept; as a consequence, the ordinance creates a restriction that is entirely irrelevant on its face to the legislative goal. That irrelevance constitutes irrationality, and the ordinance therefore fails

rationally to relate to the expressed legislative purpose. Because the ordinance does not in fact limit *density* of animal population at any site, it does not substantially relate to general welfare.[4]

Because at this juncture the ordinance apears to be unreasonably related to the County's goals, arbitrary, *and* discriminatory, the Court preliminarily concludes that the ordinance is unconstitutional and that plaintiffs are likely to prevail at the final determination of the merits of count two.

The Court finds that plaintiffs will suffer irreparable harm if the ordinance is enforced, both because the constitutional violation itself is unlikely to be redressable by money damages and because enforcement of the ordinance will unduly impinge upon plaintiffs' urgent efforts to establish their kennel in a new location once it moves from its present site.

The Court further finds that the threat to plaintiffs if the injunction does not issue outweighs any harm to other parties as a result of the injunction. Finally, the Court determines that the public interest will be served by the prohibition of enforcement of the unconstitutional ordinance.

For the reasons stated above, the Court ENJOINS defendants Rockdale County, C. S. Smith, Jr., and Randy

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[4] For example, under the ordinance plaintiffs could keep only 150 dogs and 50 cats on their new, 220-acre property. The same area, if subdivided and owned separately, could, consistently with the ordinance, contain over 8000 dogs and 2400 cats, even allowing for the effect of set-back requirements.

Mills, and any other officer of Rockdale County, from applying or enforcing Section 9-3009 of the Rockdale County Code until further order of this Court.[5]

IT IS SO ORDERED, this 25th day of March, 1985.

/s/ Marvin H. Shoob, Judge
United States District Court
Northern District of Georgia

AN ORDINANCE TO REGULATE THE SIZE AND LOCATION OF KENNELS IN ROCKDALE COUNTY; TO PROVIDE PENALTIES FOR VIOLATION THEREOF; TO SUPPLEMENT OTHER ORDINANCES AND FOR OTHER PURPOSES

BE IT ORDAINED by the Board of Commissioners of Rockdale County, Georgia, and it is hereby ordained by authority of same as follows:

SECTION I

There is hereby adopted a new Section of the Code of Rockdale County, to be known as Code Section 9-3009 and it shall read as follows:

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[5] Although plaintiffs moved for consolidation of trial upon the merits with the hearing on the motion for a preliminary injunction, the Court did not consolidate the trial and the hearing. This injunction will therefore continue until full resolution of the claims at a later stage in the case.

Plaintiffs also requested that the Court, in the preliminary injunction, restrain defendants from taking any step to move the animal shelter from its present location and to direct defendants to issue development permits on plaintiffs' new property. The Court has no jurisdiction to restrain defendants from action concerning the shelter at its current location. The Court may have jurisdiction to order some relief as to the county's consideration of plaintiffs' development permit applications, but that matter is not yet ripe

(Continued on following page)

SECTION 9-3009—MAXIMUM SIZE OF KENNELS.

(a) A kennel is hereby defined to include the keeping of dogs and/or cats for commercial, non-commercial or charitable purposes at or on a particular location or site where said dogs or cats are restrained or confined within a fence, building, structure or other enclosure.

(b) It shall be unlawful for any person, firm, corporation, unincorporated association, partnership, joint venture, charitable organization or other legal entity to maintain or operate a kennel within Rockdale County in which the number of dogs exceeds 150 in number, or in which the number of cats exceeds 50 in number.

(c) In determining the population limits of a kennel, joint ownership or joint control of separate kennel sites or locations by the same person, firm, corporation, unincorporated association, partnership, joint venture, charitable organization or other legal entity shall cause all dogs and/or cats involved in such jointly owned or jointly controlled separate kennel sites or locations to be added together and counted as one kennel—if the kennel sites or locations are located within one nautical mile of each other.

(d) This ordinance is intended to prohibit the concentration of dogs and cats so that kennel operations shall not disturb the peace, tranquility, and serenity of the various neighborhoods in this County and further is intended to protect the public health, safety and welfare relative to

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(Continued from previous page)

and the Court will not intervene until a proper showing is made at the appropriate time. Common sense would require defendants to consider plaintiffs' applications for development permits in good faith.

various diseases originating with large concentrations of animals. This ordinance shall be liberally construed to accomplish the foregoing intent and purposes.

(e) Any violation of this Ordinance shall subject the offender to a fine of Five Hundred and no/100 ($500.00) Dollars and/or up to thirty (30) days in the common jails of Rockdale County for each forty-eight (48) hour period that said violation continues.

SECTION II

This Ordinance is not intended to repeal or to modify the zoning laws or regulatory ordinances of Rockdale County relative to kennels and dogs or cats but as supplementary thereto.

SECTION III

This Ordinance shall be in force and take effect upon adoption.

Adopted this 14th day of September, 1984.

BOARD OF COMMISSIONERS
ROCKDALE COUNTY, GEORGIA

/s/ C. S. Smith, Jr.
/s/ Charles S. Trohlinger

ATTEST:

/s/ Sarah R. Alexander
Ex-Officio Clerk

APPROVED AS TO FORM:

/s/ Sidney Nathan
County Attorney

First Reading September 14, 1984
Second Reading waived

APPENDIX, PART III

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8286

D.C. Docket No. 85-1741

(Filed June 5, 1986)

ANN P. FIELDS, et al.,

Plaintiffs-Appellees,

versus

ROCKDALE COUNTY, GEORGIA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, ATKINS*, Senior District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

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* Honorable C. Clyde Atkins, Senior District Judge for the Southern District of Florida, sitting by designation.

hereby VACATED; and that this cause be and the same is hereby, REMANDED to said District Court with directions in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal.

For the Court: Spencer D. Mercer, Clerk
Entered: April 8, 1986
By: Nancy A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: JUNE 4, 1986

APPENDIX, PART IV

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-8286

(Filed May 19, 1986)

ANN P. FIELDS, et al.,

Plaintiffs-Appellees,

versus

ROCKDALE COUNTY, GEORGIA, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING
(May 19, 1986)

BEFORE: GODBOLD, Chief Judge, ANDERSON, Circuit Judge, ATKINS*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellees, Ann P. Fields, et al., is DENIED.

ENTERED FOR THE COURT:

John Anderson
United States Circuit Judge

REHG-4
(Rev. 9/85)

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* Honorable C. Clyde Atkins, Senior District Judge for the Southern District of Florida, sitting by designation.

EXCERPTS FROM THE HEARING TRANSCRIPT

APPENDIX, PART V

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ANN P. FIELDS AND GERALD
FIELDS, INDIVIDUALLY, AND
LIFE FOR GOD'S STRAY ANIMALS,
INC., A CHARITABLE CORPORATION

vs.

ROCKDALE COUNTY, GEORGIA, et al

CIVIL ACTION

NO. C85-1741A

Transcript of proceedings before the Honorable Marvin H. Shoob, United States District Judge, in Courtroom 1905, United States Courthouse, Atlanta, Fulton County, Georgia, on Monday, March 15, 1985, in the above-styled action.

Appearances of Counsel:

For the Plaintiffs: Abraham Sharony
Kathleen Kessler

For the Defendants: John Nix
A. Lee Parks

Page 33, line 18 to page 34, line 1.

The Court: All Right.

For the record I will state that this court finds it does not have subject matter jurisdiction as far as injunctive relief as it pertains to the 200-foot line. The court will permit you to make an offer of proof on the basis that I have just stated, and you may supplement it later on in the hearing if you have overlooked something.

Then we will go into the constitutionality of the new ordinance or the later ordinance.

Argument of Mr. John Nix, Attorney for Rockdale County: Page 61, line 22 to page 62, line 9.

The Fields are in a position where their attorneys can make a very persuasive argument that they were the ones that were singled out. The other kennels in the county don't reach the size of what the Fields' do. They were all considered.

The county went through a factual factfinding mission to see what the sizes of other kennels were and to see what proximity they were to other subdivisions.

But we are not dealing with a situation, Your Honor, that is liquor stores or child smut shops or anything else about a concentration in an area. We're dealing with a facility that is unique, and by its very nature this ordinance addresses itself to the Fields.

Testimony by Mr. Sidney Nations, Attorney for Rockdale County.

Questions by Mr. Abraham A. Sharony, Attorney for the Fields and Life For God's Stray Animals, Inc.

Page 82, line 20 to page 83, line 5.

Q. Approximately how many days, Mr. Nation, passed between the time that you were requested to draft this ordinance and the date on which it was enacted by Rockdale County?

A. I don't have any specific recollection. It wasn't long, though. Probably not more than two weeks.

Q. Okay.

Would you agree that this ordinance was passed in view of information that was publicized about the life for God's stray animals acquiring land on Miller bottom road to move the animal shelter?

A. This ordinance was passed, in part, because of that.

Testimony by Mr. Nations, cont.
Page 101, lines 4-11.

The Court: Would you agree that it's a fair statement to say that based on the information you had the ordinance only affected the Fields at the time it was passed?

The Witness: Your Honor, I think that would probably be a fair statement except to say that it regulates—and we did put the size limitations in here so that the other two kennels that we talked about, the other two kennels, so that they would have some room for future expansion.

Testimony by Mr. Nations, cont.
Examination by Mr. Sharony.

Page 102, lines 1-19.

Q. You did call, I believe, the Tull—would you spell that for the court reporter, the kennel?

A. Tullamore. I believe it's T-U-L-L-A-M-O-R-E.

Q. And what was the second one?

A. I think it's Rockdale Kennels.

Q. And what's the animal population of these kennels, Mr. Nation?

A. If I remember right, this was last fall when we made the calls, but the information I had was Tullamore was about 130 and Rockdale was about a hundred.

Q. 150?

A. 130.

And Tullamore is adjacent to and near a large subdivision. I forget the name of the subdivision, but there's two or three hundred houses in it. We didn't want that kennel to get much larger because of its proximity to those houses.

Q. And those two kennels were the only ones that had population anywhere near 150 dogs or 50 cats, is that correct?

A. As far as I know, they are the two largest in the county.

Testimony by Mr. Randy Mills, Defendant, Director of Rockdale Planning and Development Commission.

Examination by Mr. Sharony.

Page 107, lines 10-17.

Q. Were you aware of the enactment of the new ordinance that we have been talking about at the time of its enactment, were you familiar with that that ordinance was being enacted?

A. Probably a couple of days before it was adopted.

Q. How did you become aware of that?

A. I was asked to do this phone survey also of the surrounding kennels and try to come up with a maximum number and minimum number of what they are comfortable with.

Testimony by Mr. Randy Mills, cont.

Examination by Mr. Sharony.

Page 110, ll. 9-16; p. 111, ll. 12-18; p. 112, l. 16 to p. 113, l. 2.

Q. Do you recall you spent some time, I believe you told me that you spent some time in the evening thinking about it, and you came up with several reasons why that application would be denied, and I believe you called me the next day and gave me three, four, or five reasons why that would be denied?

A. That's possible.

Q. Do you recall that?

A. I think so, yes, sir.

* * *

Q. But do you recall telling me that one of the reasons why the verbal application for development permits would and should be denied was because the shelter had been found to be a nuisance on Farmer Road and you didn't know it wouldn't be a nuisance on Miller Bottom Road, didn't you tell me that?

A. That's correct. I said it had been found by the courts to be a nuisance.

. . .

Q. Now, in addition to telling me that the finding of a nuisance would be a bar to issuing the permits, did you tell anybody else that? Did you tell the commissioners that? Did you tell the Fields that? Did you tell the newspapers?

A. I think—I vaguely remember the newspaper asking the question of whether or not I had said that about the animal shelter. I probably—I believe I said that I had.

Q. Yes, sir.

A. My book, the development permit that you are getting to and that you asked about, is based on nuisance, and, so, it is a very valid concern of mine. It's in the definition of "kennel."

Comments by Mr. John Nix, Rockdale County attorney.

Page 146, lines 15-24.

The Court: Well, I don't believe that Mr. Nix would take the position that the fact the facility might have been adjudged to be a nuisance on Farmer Road means that it's necessarily a nuisance if established on Miller Bottom Road.

* * *

The Court: Wouldn't you agree, Mr. Nix?

Mr. Nix: Your Honor, I don't believe that because it was a nuisance at Miller Bottom—I mean at Farmer Road it's necessarily going to be one. I mean that fact does not stand for the fact it's going to be one.

Testimony by Mr. C.S. Smith, Defendant, Chairman of the Rockdale County Commission.

Examination by Mr. Sharony.

Page 170, ll. 2-4; p. 173, ll. 15-22; p. 179, ll. 9-19.

These other two kennels probably would not qualify under today's ordinances to exist. They are grandfathered in.

* * *

Q. Did you testify, Mr. Smith, that the other two kennels, in your opinion, would be so-called grandfathered in under the new ordinance; is that your testimony?

A. That's my understanding. Well, under the ordinance, they have been there for a number of years. We have only had basic zoning and ordinance in Rockdale County since 1967, I believe.

Q. Would it be your opinion that Life For God's Stray Animals would also be grandfathered in?

A. . . . If it had been grandfathered in it would not be permitted to expand from that point on.

* * *

Q. Let me show you a newspaper article which has been marked Plaintiff's Exhibit 21 which states: "Asked what prompted the ordinance, Commissioner Charles Smith said, 'I think the ordinance speaks for itself.' Asked specifically if it were prompted by Life For God's Stray Animals' plans to relocate,' he replied, 'that certainly had a bearing on it.' "

Do you recall making that statement?

A. Yes, sir, yes, sir, I did.

Discussion between the Court and Mr. Lee Parks, attorney for the homeowners.

Page 232, lines 14-19.

Page 233, lines 12-17.

The Court: Not how many, but I think, if you don't have an ordinance limiting the number of animals, I think your planning and development director, or department, as the case might be, could certainly make and would have the responsibility to make a determination as to whether this was a proper use of the facilities.

* * *

The Court: He could make those same decisions under the ordinance, if you have somebody opening up a kennel with a hundred animals, the planning and development director will still have to make the determination before issuing the permit whether they have provided for the refuse and any of the other problems that they are likely to face.

No. 86-241

Supreme Court, U.S.
FILED
NOV 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

Ann P. Fields and Gerald Fields, Individually; and Life For God's Stray Animals, Inc.,

Petitioners,

v.

Rockdale County, Georgia; et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Albert M. Pearson, III
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5187

Counsel for Respondents

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STATEMENT OF CASE

A. Facts and Proceedings Below

Respondents accept the statement of facts in the petition for certiorari, subject to one clarification and to facts which have arisen after the rendition of the Eleventh Circuit's opinion in this case.

The clarification that Respondents would offer relates to the extended legal proceedings in state court that preceded the institution of this lawsuit in federal district court. Since 1980, the Petitioners have operated a "no-kill" animal shelter on Farmer Road in Rockdale County, Georgia. The legality of that operation has been the subject of much litigation. At issue has been Petitioners' compliance with local zoning ordinances and with the nuisance law of Georgia. It is not an exaggeration to say that the Petitioners have lost on all major issues in the state courts. The most crucial finding throughout these lengthy proceedings was that the Farmer Road shelter is a nuisance. As a result, it has become necessary for Petitioners to vacate

that location. They purchased an alternative 220 acre site on Miller Bottom Road (also in Rockdale County) for their new animal shelter. Despite these adverse state court rulings, the Farmer Road shelter remains in operation; the Miller Bottom Road shelter is a going concern now as well.

Here Respondents would point out a fundamental fact: there is a continuing question of state law over whether the Petitioners' attempt to move their shelter to Miller Bottom Road is in compliance with the Rockdale County Superior Court nuisance decree. This decree was affirmed by the Georgia Supreme Court in Life for God's Stray Animals, Inc. v. North Rockdale County Homeowners Assoc., Inc., 253 Ga. 551, 322 S.E.2d 239 (1984). The Petitioners' challenge to the Rockdale County kennel ordinance was and is an attempt to evade the effects of this decree. The kennel ordinance is at this point wholly peripheral to that controversy and may never be invoked to bar the Petitioners' attempt to move to the Miller Bottom Road location.

Since the Eleventh Circuit's decision in the present case, the Petitioners have been held in civil contempt for their failure to comply with the nuisance decree. However, they fled the state to avoid sanctions and their present whereabouts are unknown. Very recently, the Supreme Court of Georgia considered their appeal from the contempt order and dismissed it because of their evasion of the jurisdiction of the Rockdale County Superior Court in a matter properly before it. Life for God's Stray Animals, Inc. v. New North Rockdale County Homeowners Assoc., Inc., ___ Ga. ___, ___ S.E.2d ___ (Case Nos. 43638 & 43715; October 23, 1986).

SUMMARY OF ARGUMENT

Respondents believe that the Eleventh Circuit's decision below does not merit consideration by this Court. Specifically, the decision to vacate the district court's order declaring the kennel ordinance unconstitutional and to remand for presentation of the question to state court is consistent with Pullman

abstention principles. In any event, should the constitutional merits be reached in this case, the kennel ordinance is constitutionally valid. Respondents believe that it withstands scrutiny under the rational basis test.

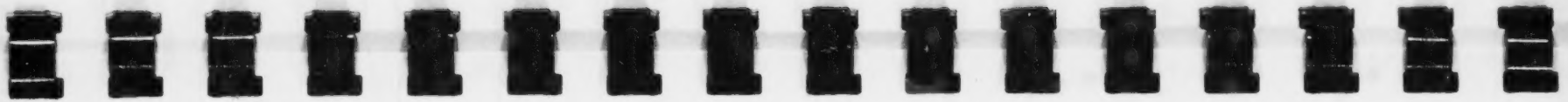
ARGUMENT

I. Pullman Abstention Issue Correctly Decided

It would be difficult to discuss this issue without mentioning that the Petitioners' resort to federal court in this case is at least puzzling, if not somewhat disingenuous. Petitioners challenged the constitutionality of the kennel ordinance on Fourteenth Amendment due process and equal protection grounds. Nowhere in their federal complaint do they mention a pendent state claim based on the Georgia Constitution. At first glance, this might seem totally unexceptional. Petitioners' position, however, begins to become unusual when note is taken of the case authority they rely upon. Instead of citing and discussing this Court's many zoning and economic regulation

cases applying the rational basis test, they relied entirely on three Georgia cases, Avant v. Douglas County, 253 Ga. 225, 319 S.E.2d 442 (1984); Shoemake v. Woodland Equities, 252 Ga. 389, 313 S.E.2d 689 (1984); Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975). What makes these three cases especially noteworthy is the clear suggestion that the kennel ordinance violates Article I, section 1, paragraph 1 of the Georgia Constitution -- the Georgia due process clause.

Essentially, the Petitioners tried to make the federal district court a surrogate state court to rule on the validity of the kennel ordinance on state constitutional grounds. What else can explain the authority which they cited? Having relied upon it, however, the Petitioners found themselves trapped. They wanted the Eleventh Circuit to follow the Georgia cases in deciding the merits of the constitutional question -- despite the fact that the Georgia due process standard in this instance is



stricter than the federal[1] -- and yet ignore those same cases in considering Pullman abstention.

Basically, the Eleventh Circuit ruled that since state constitutional law was arguably so much in Petitioners' favor, they ought to take their contention back to state court to press it. Federal judicial intervention, the court suggested, would seem pointless if state law provides for the relief that Petitioners sought. This is the general policy behind Pullman abstention. Adding support to the Eleventh Circuit's reasoning are two factors: (1) the kennel ordinance has never been interpreted judicially and there are several uncertainties about its application to the animal shelters operated by the Petitioners; and (2) land use questions tend to involve matters of intensely local concern and hence

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[1]The Eleventh Circuit correctly noted this fact. Fields v. Rockdale County, 785 F.2d 1558, 1561, n. 4 (11th Cir. 1986). To have accepted Petitioners' invitation would have run afoul of this Court's decision in Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

there is a real potential for unnecessary friction between federal and state courts.

II. Kennel Ordinance Valid Under Rational Basis Test

Should this Court decide that Pullman abstention was unwarranted, the Petitioners cannot prevail on the merits in any event. The challenge to the kennel ordinance must be assessed under the rational basis test which is essentially the same under federal due process or equal protection analysis. This means that the kennel ordinance enjoys a strong presumption of constitutional validity and that the burden is on the challenger to displace this presumption. The kennel ordinance must be upheld as long as it serves some legitimate purpose. To prove otherwise, the Petitioners in this case had to demonstrate the lack of any conceivable relationship between the kennel ordinance as enacted and the purposes it might be said to promote. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981).

It is difficult to understand how the Petitioners could believe that the record in this case satisfies federal due process or equal protection requirements for invalidating the kennel ordinance. Petitioners have never disputed the difference between "kill" and "no-kill" animal shelters. The Humane Society is an example of the former. After animals are kept for a specified period, they are put to death. The animal population at such a shelter is kept under control in this way. A "no-kill" animal shelter such as those run by Petitioners takes stray animals that people would be unlikely to want as pets and attempts to sustain them for the rest of their natural lives. The animal population at such shelters tends to be quite large. Respondents believe that the presence of a "no-kill" animal shelter in a county with a rapidly increasing population necessitated a general ordiance dealing with the animal population in all kennels. The specific aim of the ordinance was to minimize the noise, odor and sanitation problems associ-

ated with kennels. Surely that is a legitimate, if not a substantial, regulatory purpose.

Did Rockdale County have any conceivable factual basis for believing that the population limits would advance this purpose? All kennels were limited to 150 dogs and 50 cats. To the extent that noise, odor and sanitation problems are a function of kennel size, Rockdale County plausibly could have found that smaller is better. Admittedly, that is not an especially inspiring defense of the ordinance, but it is accurate and well above the minimum set under the rational basis standard. Perhaps encouraged by the contrary-to-fact hypothetical in the trial judge's opinion,[2] Petitioners suggested

---

[2]The trial judge apparently believed the ordinance lead to absurd results. To prove his point, he gave this example using the tract at Miller Bottom Road: "[U]nder the ordinance, plaintiffs could keep only 150 dogs and 50 cats on their new, 220-acre property. The same area, if subdivided and owned separately, could, consistent with the ordinance, contain over 8,000 dogs and 2,400 cats even allowing for the effect of set-back requirements." Significantly, the trial judge stopped short of saying that the purpose of the ordinance was to achieve that result. In effect, his reluctance to take that final step made the hypothetical irrelevant under rational basis analysis.

below that the kennel ordinance would limit the size of their operations, but would allow separately owned kennels to operate side-by-side from one end of the county to the other -- making a mockery of the population limits. This alleged loophole to the ordinance is truly an academic contrivance. It assumes that a perhaps imperfectly drawn law will be construed in a manner that defies common sense. The argument reveals more about the weaknesses of Petitioners' case than it does the flaws in the Rockdale County kennel ordinance. The presumption of constitutionality that attaches to economic and social legislation -- of which the kennel ordinance is an example -- gives the benefit of the doubt to the statutory drafters and to those responsible for enforcing and interpreting the law.

CONCLUSION

The Eleventh Circuit correctly ruled on the Pullman abstention ground. Respondents at oral argument actually preferred to get a ruling on the due process and equal protection issues to bring the Petitioners' federal court diversionary maneuver to an end. Either way, Respondents believe that the law favors their position. In the last analysis, even if the Eleventh Circuit erred, the issues in this case have significance in the main only for the citizenry of Rockdale County, Georgia. The criteria for certiorari are not met.

Respectfully submitted,

Albert M. Pearson, III
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5187

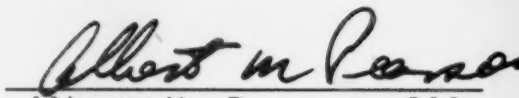
Counsel for Respondents

CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, I certify that on the 13th day of November, 1986, a copy of the preceding BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was mailed first-class, postage prepaid to:

Kathleen Kessler
Carr & Kessler
3384 Peachtree Road
Suite 250
Atlanta, GA 30326

I further certify that all parties required to be served have been served.



Albert M. Pearson, III
University of Georgia
School of Law
Athens, Georgia 30602
(404) 542-5187

Counsel for Respondents

Supreme Court, U.S.
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Rockdale County, Georgia; et al.,
Respondents.

PETITIONERS' RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Kathleen Kessler
Carr & Kessler
3384 Peachtree Road, N.E.
Suite 250
Atlanta, Georgia 30326
(404) 233 5008
Petitioners' Counsel of Record

Abraham A. Sharony
4721 Chamblee-Dunwoody Rd.
Suite 302
Atlanta, Georgia 30338
(404) 395 6576
Counsel for Petitioners

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ARGUMENT

The petition for certiorari raised the issue of whether the Eleventh Circuit erroneously directed abstention on a federal question involving a kennel ordinance which barred Petitioners' shelter from Rockdale County, Georgia.

Petitioners respectfully but strongly disagree with a paragraph in Respondents' statement of the case, which appears to raise new issues presumably based on facts occurring since the petition was filed.

Petitioners take issue with the following statement in Respondents' brief, p.2:

> "Here Respondents would point out a fundamental fact: there is a continuing question of state law over whether the Petitioners' attempt to move their shelter to Miller Bottom Road is in compliance with the Rockdale County Superior Court nuisance decree. . . . The Petitioners' challenge to the Rockdale County kennel

> ordinance was and is an attempt to evade the effects of this decree. The kennel ordinance is at this point wholly peripheral to that controversy and may never be invoked to bar the petitioners' attempt to move to the Miller Bottom Road location."

Respondents have tangled the facts so carefully separated by the District Court and accepted by the Eleventh Circuit.

The pertinent facts remain unchanged, which facts Respondents accepted in the first sentence of their fact statement:

> "None of the state court litigation applies to the new kennel ordinance. None of the state court litigation applies to the Fields' use of the Miller Bottom Road property. The state court has not been inhibited by the federal court action in enforcing its judgments [against the Farmer Road site]."
> Petitioners' brief, p.7.

Further, Petitioners' move to the Miller Bottom Road site is not an attempt

"to evade the effects of [the Rockdale County court's] decree," but rather, it shows "plaintiff's urgent efforts to establish their kennel in a new location" to **comply** with the nuisance and set-back decrees. District Court's order, App.20.

Respondents' suggestion of mootness in the paragraph quoted is also in conflict with the facts, because the kennel ordinance had already been invoked to bar Petitioners' move to Miller Bottom Road:

> "Because of the ordinance's presumptions and predetermination of nuisance per se if a kennel exceeds the 150/50 animal limitation, Rockdale County officials refused the Fields all necessary development permits to allow the Fields to move the animals to the new site at Miller Bottom Road. App.31-32. Thus, as late as the hearings on this case in February and March of 1985, the Fields were unable to get permits to construct a new shelter, move the animals, or abate the nuisance declared by the Rockdale Superior Court against the Farmer Road site. App. 31."
> Petitioners' brief, p.6.

Thus, there is no nuisance or zoning action in the state courts of Georgia affecting the Miller Bottom Road site or the kennel ordinance. The nuisance and setback requirements apply only to the Farmer Road site. Petitioners' purchase of property in 1984 on the Miller Bottom Road site was to comply with the court's nuisance and setback rulings by moving from Farmer Road. And the kennel ordinance issue is not moot. The ordinance is one of several obstacles put in Petitioners' way by the county officials themselves to impede Petitioners' efforts to abate the Farmer Road issues by moving the kennel to Miller Bottom Road to unwanted property next door to a dump.

The issues and suggested issues raised in the quoted paragraph of Respondents' statement of case do not exist, as the record shows. There is no state court bar to the federal court's

resolution of federal constitutional questions presented in Petitioners' challenge to the kennel ordinance.

Respectfully submitted,

ATTORNEYS FOR PETITIONERS

KATHLEEN KESSLER
ABRAHAM A. SHARONY

Kathleen Kessler
by: KATHLEEN KESSLER

Please address all
communications to:
Kathleen Kessler Esq.
Carr & Kessler
3384 Peachtree Road, N.E.
Suite 250
Atlanta, GA 30319
(404) 233 5008.
St. Bar #416575.